IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 286 of 1987

with

CRIMINAL REVISION APPLICATION No 645 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

MAHESHKUMAR P SHAH

Appearance:

1. Criminal Appeal No. 286 of 1987
   PUBLIC PROSECUTOR for Petitioner
   NOTICE SERVED for Respondent No. 1

2. Criminal Revision ApplicationNo 645 of 1986
   MR DF AMIN for Petitioner
   PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH
Date of decision: 28/01/2000

ORAL JUDGEMENT

#. Both these proceedings arise out of judgment and order dtd.17.12.1986 rendered by learned Additional Sessions Judge, Nadiad in Criminal Appeal No.55 of 1985 which was filed by the accused Maheshkumar Popatlal Shah who happens to be petitioner in Criminal Revision Application no.645 of 1986 against his conviction and sentence dated 30.9.85 rendered in Cri. Case No.2038 of 1983 by the learned Judicial Magistrate First Class, Khambhat. The State appears to have preferred aforesaid appeal on account of reduction of the sentence by the learned Additional Sessions Judge. The revisionist petitioner, hereinafter referred to as accused, has challenged his conviction as confirmed by the learned Additional Sessions Judge.

#. By the first order the accused was convicted for the offence punishable under Sec.406 of Indian Penal Code (I.P.C. for short) and sentenced to undergo rigorous imprisonment (R.I. for short) for 18 months and to pay a fine of Rs.3,000/- and in default to undergo R.I. for six months. As per the appellate order the conviction stood confirmed but while noting the circumstances attending the accused and original complainant and in the facts and circumstances of the case sentence was reduced to 3 months R.I. and fine was reduced to Rs.500/-. However, the default sentence was reduced to one month.

#. It was the prosecution case that one Manubhai Shanabhai Patel of Village Finav, Taluka Khambhat lodged his complaint against the accused herein and one Lalchand Popatlal Shah before the Trial Court on 25.7.1983 that the accused and said Lalchand Popatlal Shah being the brothers had dealings with Finav Seva Sahakari Mandli Ltd., ("society " for short) represented by its chairman Chimanbhai Kishorbhai Patel and Manubhai Shanabhai Patel being one of the members of the Executive Committee. It was the case of the complainant that the Executive Committee of the society by its Resolution No.2 dtd.26.5.83 authorised the chairman of the society and the complainant to take all legal actions against the accused and his brother in respect of Rickshaw No.GTU-647 having been given to the accused for plying against payment of hire charges at the rate of Rs.1,000/-p.m. Both the accused had agreed to pay the hire charges every month as per the terms and conditions of the agreement. The amount of loan due to the society was to be paid by the two accused persons by monthly instalments of

Rs.1,000/- and they were to bear necessary expenses like repairs, petrol, oil etc. for the rickshaw. The accused paid one of the instalments of the amount of loan to the Society but ultimately the accused committed breach of the terms and conditions of the agreement by not paying the hire charges/ instalments to the society. Thereafter, they also failed to hand over the possession of the rickshaw to the society. Instead, they disposed of the rickshaw by sale to somebody and misappropriated the amount of sale proceeds of the rickshaw. It is the case of the society that the accused persons did not have any right, title and interest in selling the rickshaw and they accordingly committed breach of trust by disposing of the rickshaw and misappropriated the sale proceeds. They were accordingly charged with the offence punishable under Sec.408 read with 114 or 34 of I.P.Code. After investigation into the complaint as per order under Sec.156 (3) of the Cr.P.C., the accused persons were chargesheeted. At the conclusion of the trial the learned Judicial Magistrate, First Class, Khambhat ("Trial Court" for short) rendered conviction and sentence against the accused as aforesaid. In appeal, the learned Addl. Sessions Judge considered the whole of the evidence afresh and confirmed the conviction while reducing the sentence, recording following reasons :

"looking to the fact that the Mandli has passed a resolution Exh.41 dtd.21.8.84 on page 49 of Resolution Book now it is an admitted fact that the Mandli had filed a civil suit against the accused no.1 in the court of Board of Nominees, and in that Civil proceeding the Board of nominees has passed a decree of Rs.27,152/- with costs against accused No.1, and the Mandli decided to compromise the criminal case lodged in Khambhat court and for that complainant was authorised to submit compromise purshis in the case. Because the value of Muddamal article was more than Rs.250/- the complainant could not compromise the case with accused No.1. Looking to the facts and circumstances of this case I am of the opinion that sentence imposed is too harsh and excessive. I am of the opinion that ends of justice will meet if quantum of sentence is reduced to Rigorous Imprisonment for 3 months and to pay a fine of Rs.500/- and i/d. to under-go further R.I. for one month and therefore I answer point No.2 to the effect that the learned Magistrate has not awarded proportionate sentence in the case."

#. As stated above both the State and accused have felt aggrieved with the aforesaid decision. That is how they are before this court respectively in the aforesaid appeal and the revision application.

#. Mr.N.D.Gohil learned A.P.P. for the State and Mr.D.F.Amin, learned advocate for the accused have been heard.

Both the Courts have considered this evidence placed on record:
(1) Oral testimony of Manubhai Shanabhai, complainant P.W.1 exh.15 (2) Oral testimony of Chhaganbhai Dahyabhai (Secretary of the Society) P.W. 2 exh.43 (3) Oral testimony of Chimanbhai Kishorbhai Patel (Chairman of the Mandli) P.W.3, exh.56 (4) Panch witnesses Vinodkumar Ishvarbhai, exh.59 (5) Ramanbhai Shanabhai, P.W.9 Exh.67. (6) Kalidas Jivabhai, who produced Rickshaw, PW 5, Exh.61. (7) Harjivanbhai laxmanbhai, P.W.6, Exh.62.(8) Dilipbhai Chhotabhai, P.W.7, Exh.63. (9) Chaturbhai Vishrambhai, P.W.8, Exh.64 (10) Mahijibhai Devabhai, P.W.10, exh.69 (11) Shankerbhai Dipchand, P.W.12 Exh.74 (12) Police Head Constable Budhaji Zaluji, P.W.11, Exh.71, (13) Police Head Constable Vajesing Chaturbhai, P.W.13 Exh.75.

Following documents have also been placed on record:
(1) Resolution book of the society Exh.31 containing pages Nos.7 & 8, (2) Resolution Book of the society Exh.32 containing pages Nos. 10 & 11 and (3) page Nos.12 & 13 of Resolution Book Exh.33, (4) Original application dated 14.10.1982 of the accused no.1 appearing at Exh.34, (5) Original writing dated 13.2.83 passed by the accused appearing at Exh.35, (6) Original voucher No.194 dtd.31.10.82 passed by the accused No.1 for Rs.8,571.50ps at Exh.37, (7) original voucher No.266 dtd.30.11.82 for Rs.300/- Exh.38, (8) original voucher No.436 31.1.83 for Rs.600/- Exh.39, (9) original complaint Exh.40, (10) panchnama dtd.5.8.83 whereunder muddamal rickshaw was seized Exh.60, (11) writing on stamp paper dtd.24.3.83 executed by the accused Exh.65, (12) voucher No.785 dtd.13.7.83 for Rs.500/issued by Shiv Hire purchase & co. at Exh.66.

It appears that the accused relied upon the following documents:
(1) Resolution No.2 dtd.21.8.84 appearing on page no.49 of the Resolution Book of the society Exh.41, (2) Notice No.24-2039 dtd.27.5.83 addressed by the chairman of the society Exh.57, (3) original R.C.A Book for

rickshaw No.GTU(J) 647 Exh.82, (4) Original permit Exh.83, (5) Original token for taxes paid Ex.84 and (6) Insurance policy Ex.85.

#. Learned Additional Sessions Judge has traced the history regarding the relation of the accused with the society in following terms :

"Accused No.1 was serving as `Tolat' (a person who weighs goods and delivers that weighed goods to the person who has purchased that goods) in the Mandli, Accused No.1 had sold the fertilizer worth of Rs.17,600/- on credit without any authority obtained from the Mandli. Thereafter accounts of the Mandli were audited by the auditor. Thereafter Auditor asked accused No.1 to deposit the said amount of Rs.17,600/in the office of the Mandli, but accused No.1 did not deposit accordingly. Thereafter auditor prepared papers for case to be filed against the accused No.1 through the Registrar of co-operative societies. On coming to know about the facts that auditor has prepared the papers for case to be filed against accused No.1 both the accused went to the Mandli and supplicated the members of the Executive Committee not to lodge the case against the accused No.1. Thereafter accused No.1 sold his rickshaw No.GTU (J) 647 to the Mandli and a price of rickshaw was fixed at Rs.26,152 and the Mandli purchased the said rickshaw from accused No.1. As on 16.10.82 Rs.17,602.20ps. were found due from accused to the Mandli. that amount was deducted from the sale price of Rs.26,152/- and Rs.8571.50ps were paid in cash to accused No.1 on 31.10.82 vide voucher Ex.37. Thereafter, mandli gave that rickshaw to accused No.1 with a condition that accused No.1 should ply that rickshaw on hire and he should bear all the expenses to ply that rickshaw, and accused no.1 should pay in lumpsum Rs.1000/- p.m. to Mandli. Thereafter accused No.1 plied that rickshaw for about 2 months. As accused No.1 did not pay a single pai at the rate of Rs.1000/p.m. to the Mandli the accused No.1 made an application dtd.14.10.82 Ex.34 to the Mandli, requesting Mandli to employ him as a driver for monthly pay of Rs.3000/-. Accordingly the Mandli employed the accused No.1 as driver for that rickshaw for monthly pay of Rs.300/-. Accordingly accused received pay for the period from 1.11.82 to 31.1.82 and thereafter without giving any information to the Mandli he sold that

rickshaw to Kalidas Jivabhai, P.W. 5 on or about 24.3.83. The Chairman and the Secretary of the Mandli came to know that accused No.1 had already sold that rickshaw to Kalidas Jivabhai P.W.5, They addressed a notice Ex.57 to both accused, but both the accused neither replied notice nor gave any explanation for allegations made in that notice Ex.57."

#. Upon appreciation of the evidence the learned Additional Session Judge has concurred with the finding of the Trial Court that Rs.17,602.20ps were due and payable to the society and accused sold rickshaw to the society for Rs.26,152/- by receiving balance amount of Rs.8,571.50ps as per the voucher Ex.37. Evidence of witness Harjivanbhai has been discussed at length and the same has been accepted. It has been concluded that the original owner of rickshaw sold rickshaw in question to the accused and it was of no consequence that the RCA Book which was handed over to the accused did not contain entry of the name of the accused. Documents of title to the rickshaw in question were handed over to the accused and the accused produced the same with list Ex.81 and has also led other documentary evidence showing that the possession of the rickshaw was handed over to the society who in turn entrusted the same to be used on hire basis by the accused. It has been also established that the accused was employed as a driver of the rickshaw in question. It has therefore been concluded that the prosecution established from both the documentary as well as oral evidence that the accused sold the rickshaw to the society and the society had given that rickshaw to the accused under the agreement Ex.35 for consideration of payment of Rs.1,000/- p.m. lumpsum to the society and that accordingly the rickshaw was entrusted by the society to the accused for plying the same on hire. It also appeared in the prosecution evidence that for the period of 3 to 4 months he plied the rickshaw in question and did not pay hire charges at the rate of Rs.1,000/- as per agreement Ex.35. It has also come in the evidence that he sold the rickshaw to one Kalidas P.W.No.5 Ex.61 who deposed that he was doing business of plying rickshaw on hire and for that purpose he wanted to purchase the rickshaw and in the company of one Chaturbhai Vishrambhai P.W.No.8, he came to Finav, and met present accused, had talk with him, the accused offered the rickshaw in question for sale to him for Rs.21,000/- and that he paid Rs.51/- by way of earnest money to the accused. The witness further deposed that on 24.3.83 the accused went to Anand in the rickshaw in question and on that day he paid Rs.13,000/- in cash to the accused with an agreement

to pay balance amount of Rs.8,000/- by monthly instalment of Rs.740/- to the shroff as the accused had not paid that amount to the shroff as per hire purchase agreement. Accordingly the accused handed over the possession of the rickshaw in question to the said purchaser (Kalidas Jivabhai). It has also been established from the documentary evidence that the accused executed one writing Ex.65 in favour of purchaser Kalidas Jivabhai. Thus it has appeared from the prosecution evidence that the rickshaw in question was entrusted to the accused by the society and the accused disposed of the same in favour of the aforesaid Kalidas Jivabhai who paid the price as per writing Ex.65.

#. I have gone through the evidence relied upon on behalf of the accused in the proceedings before the Lower Court. I am of the opinion that the conclusion reached by the Lower Court as well as the appellate court as aforesaid is inescapable.

#. However, it is not in dispute that there was a settlement between the society and the accused as reflected in the judgment of the appellate court. The observation of the appellate court has been reproduced in the opening part of this judgment. In my considered opinion the reasons given by the appellate court are quite germane for reduction of the sentence. Those reasons should also weigh before this Court for it has been admitted that more than fifteen years have passed since the accused came to be charged with committing breach of trust reposed by the Society in him. It has therefore been submitted that the sentence should be further reduced to that which has been undergone.

##. In view of the facts and circumstances of the case and considering the evidence of prosecution and the acts of the parties in compromising the matter before the Board of Nominee, as also passage of more than 15 years as aforesaid, following order is required to be passed.

Criminal Appeal No.286/87 for enhancement of sentence is hereby dismissed. Criminal Revision Application No.645/86 is partly allowed reducing the sentence including the default sentence as undergone by the accused. Rule is made partly absolute accordingly in the revision application.

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